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IN THE

Supreme Court of the United States

October Term, 1960

No. 116

POLAROID CORPORATION,

Petitioner,

—v.—

POLARAD ELECTRONICS CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

PAGE

I. Questions Presented 2

II. Statement 5

III. Argument 9

No reasons exist for granting the writ 9

There are no conflicts with the decisions of this Court or of other Courts 9

This petition presents no questions of public importance relating to the construction of the Trademark Act of 1946 17

The Court below in sustaining the defense of laches decided a real question 19

IV. Conclusion 20

TABLE OF CASES:

Anheuser-Busch v. DuBois Brewing Co., 175 F. 2d 370 (3rd Cir., 1949) 14

Avon Shoe Co., Inc. et al. v. David Crystal, Inc. et al., 279 F. 2d 607 (2d Cir., 1960); cert. den. 364 U. S. 909 (1960) 18

Brown v. Allen, 344 U. S. 443, 459 (1953) 19

Thomas J. Carroll & Son v. McIlvaine & Baldwin, 183 Fed. 22 (2nd Cir., 1910) 14

PAGE

Dwinnell-Wright Co. v. White House Milk Co., 132 F. 2d 822 (2nd Cir., 1945) 14, 16

Emerson Electric Manufacturing Co. v. Emerson Radio & Phonograph Corporation et al., 105 F. 2d 908 (2nd Cir., 1939); cert. den. 308 U. S. 616 (1939) 16

France Milling Co. v. Washburn-Crosby Co., 7 F. 2d 304 (2nd Cir., 1925) 13

French Republic v. Saratoga Vichy Co., 191 U. S. 427 (1903) 11

Grove Laboratories Inc. v. Brewer & Co., 103 F. 2d 175 (1st Cir., 1939) 15

Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 413 (1916) 1

Independent Nail & Packing Co., Inc. v. Stronghold Screw Products Inc., 205 F. 2d 921 (7th Cir., 1953) 14

Landers, Frary & Clark v. Universal Cooler Corp., 85 F. 2d 46 (2d Cir., 1936) 16

Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35 (8th Cir., 1910) 16

Mantle Lamp Co. of America v. Aladdin Mfg. Co., 78 F. 2d 426 (7th Cir., 1935) 14

McLean v. Fleming, 96 U. S. 245 ..... 10, 11, 12, 16, 17

Menendez v. Holt, 128 U. S. 514 (1888) 9, 10, 11, 12, 14, 16, 17

Nashville Milk Co. v. Carnation Co., 238 F. 2d 86, 88 (7th Cir., 1956); aff'd 355 U. S. 373 (1958) 19

PAGE

Pflugh v. Eagle White Lead Co., 195 Fed. 769 (3rd Cir., 1911) 14

Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 340 (1928) 19

Safeway Stores Inc. v. Dunnell, 172 F. 2d 649 (9th Cir., 1949) 16
Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19 (1900) 11, 12
Securities & Exchange Commission v. Chenery Corp., 318 U. S. 80, 88 (1943) 19
Seven-Up v. O-So-Grape Co., 283 F. 2d 103 (7th Cir., 1960); cert. den. —— U. S. ——, 5 L. Ed. 2d 859 (April 3, 1961) 14, 16
Southern Pine Lumber Co. v. Ward, 208 U. S. 126, 140, 141 (1908) 13
Stork Restaurant, Inc. v. Sahati, 166 F. 2d 348 (9th Cir., 1948) 16

Triplett v. Lowell, 297 U. S. 638, 639 (1936) 17

Union Pacific R. Co. v. Mason City & F. & D. R. Co., 199 U. S. 160, 166 (1905) 19
United Drug Co. v. Rectanus Co., 248 U. S. 90, 97 (1918) 1

Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189 (S. D. N. Y., 1913) 13

Statutes:

Federal Rules of Civil Procedure, Rule 52(a) 4

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No. 999

POLAROID CORPORATION,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is an ordinary trademark infringement suit.* There has been no diversity of opinion in the Courts below. The District Court dismissed the complaint in an eighteen-page

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* Initially, this suit also included a count for unfair competition (Pet. 7), apparently abandoned here by petitioner. Since that count was based upon the same facts as the infringement count, it is difficult to see how, in the absence of trademark infringement being can be any trademark infringement, trade of unfair competition, there merely a species of unfair competition. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 413 (1916); *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97 (1918).

opinion (299a).* The Court of Appeals unanimously affirmed dismissal in a twelve-page printed opinion (Pet. 25-36). No unusual question of law or fact is involved. No reason exists for the intervention of this court.

I

QUESTIONS PRESENTED (PET. 2-3)

The "Questions Presented" by petitioner are essentially hypothetical. They fail to reflect accurately or completely the facts of this case.

Question 1

This question is not present in this case for at least six reasons:

a. It fails to state that respondent's adoption of its mark and name was in good faith, and without knowledge of any use of petitioner's mark or name in any business resembling that begun by respondent (Pet. 28, 33).

b. Petitioner *assumes* without factual basis, that respondent's trademark is "likely to cause confusion as to the source of origin of the goods with which it is used." The U. S. Patent Office and the District Court found to the contrary (A260-266, 299a-311a), and the Court of Appeals found it unnecessary to pass upon this point (Pet. 32, 26), only indicating that as to the about-to-be discontinued television phase of respondent's business (A134) it was given

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* "—a" refers to petitioner's record-appendix as plaintiff-appellant below; "A—" refers to respondent's record appendix as defendant-appellee below; "Pet.—" refers to petition for certiorari and its Appendix. "Respondent" as used herein includes its predecessors which have formed with respondent a continuous business enterprise.

"some pause" and was "by no means sure" (Pet. 31). However, as to respondent's major business in microwave equipment, the Court below stated it would have had "little difficulty in approving the District Court's conclusion" (Pet. 31).

c. There was more than "mere delay" in this case. There was conduct amounting to estoppel, upon which both courts below concurred (Pet. 32-36).

d. "Assent or acquiescence by the plaintiff in the defendant's use" was *not* "absent". Petitioner's continued inaction and failure to protest, even after respondent directly relayed to it a missent letter (Pet. 28), was implied assent.

e. There were and are no goods of the parties "in direct competition".

f. There were and are no goods of the parties which are "closely related". Only one insignificant product is even similar in function (Pet. 30-31).

To reflect accurately the facts of this case, Question 1 should be rewritten as:

> "1. In an action for infringement of a registered trademark brought under the Trademark Act of 1946, 15 U. S. C., Section 1114 *et seq.*, where defendant innocently and in good faith adopts and uses a different but similar trademark for non-competing goods in a widely different field of business activity, may an eleven year implied acquiescence by plaintiff in the defendant's open and widespread use before protest or suit, coupled with a large investment by defendant in expansion during that period in the belief plaintiff did not consider any conflict to exist, constitute an estoppel barring injunctive relief."

Question 2

This question does not arise at all. Respondent's microwave goods were part of its original business as early as 1945 (A. 276), and petitioner's delay as to these admittedly non-competitive goods (Pet. 21) was no shorter than as to any other goods. No "competitive" goods exist.

Question 3

This question again is incomplete and inaccurate in its premises.

It fails to state that respondent adopted its name and work in good faith, and with no knowledge of petitioner and its mark except in an entirely unrelated field of business activity.

Neither court below held that "close similarity" is required for injunctive relief. The District Court specifically used the statutory test of likelihood of confusion (300a-301a, 301a-302a). The Court of Appeals discussed the criteria for likelihood of confusion at Pet. 30.

Question 4

This question is not present in this case. The parties' goods are *not* competitive, and respondent's counterclaim was placed in the alternative and was not compulsory.

Question 5

This question as stated is not present in this case. The Court of Appeals did not have "disagreement" (Pet. 3) with the District Court's judgment; it indicated a lack of sureness about whether plaintiff was entitled to some relief, absent its dilatory action (Pet. 31-32). Such uncertainty is far from a holding of "clearly erroneous", necessary for a reversal under Rule 52(a), F.R.C.P. The

Court of Appeals did not "expressly refuse" (Pet. 3) to decide this issue, but said it was "not required to decide that" (Pet. 32) and found it "unnecessary to pass" upon (Pet. 26) thereby leaving the Trial Court's findings undisturbed.

II

STATEMENT

Petitioner's statement (Pet. 4-10) sets forth an incomplete and somewhat inaccurate review of the salient facts here. The comprehensive opinion of the District Court (299a-311a) and the extensive opinion of the Court of Appeals (Pet. 25-36) set forth most of the relevant facts and will not be repeated.

The following paragraphs correct some of petitioner's inaccuracies and supplement the opinions below.

Up to 1944, petitioner's entire commercial business was limited to optical products, including those using polarizing materials (A5-A47, A258-A259). Its government work up to then was secret (A81, 50a) and could have gained no public recognition of its mark.

Petitioner is incorrect in stating (Pet. 5) that "Since 1943, petitioner has been selling Schmidt corrector plates and related optical systems *for use in television*."* The Schmidt corrector plate is a piece of plastic serving as an optical lens (33a). Petitioner's officer conceded that the lenses used before 1945 were *not* used in television (34a). Only years after respondent's business began, did petitioner supply this plastic lens to manufacturers of television receivers (A26-27, A218), as a purely optical component (A219).

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* Emphasis added throughout, unless otherwise noted.

After the advent of the Land 60-second camera in 1948, petitioner's business expanded and its advertising and promotional expenditures have similarly increased, being solely for photographic products from 1955 on (A76-78). Only since this large scale photographic advertising began in 1949 (four years after respondent's business began) has petitioner's trademark become widely known among the consuming public.

Respondent's founders originally knew of petitioner's trademark only in connection with sunglasses and polarizing materials (119a, A209-10, A256, Pet. 28). Contrary to petitioner's insinuation that this was fraud (Pet. 14) the District Court expressly held that respondent "was justified in believing, and apparently did believe, that the plaintiff did not consider its trade name and business activities to be in conflict with those of the plaintiff" (309a). Even up to 1955, respondent knew only of petitioner's use of its name and mark in the fields of optics and photography (Pet. 33), concededly fields not pursued by respondent (Pet. 29). Therefore respondent justifiedly and in good faith adopted and began using its name and mark in 1944.

Petitioner and respondent are not and never have been competitors. They have never manufactured or sold competitive products. Respondent's products are highly technical microwave electronic equipment, television broadcast studio electronic equipment (which at the trial was in process of being discontinued (A134) and has since been discontinued), and two specialized laboratory instruments: a titrator and a viscometer. Petitioner admitted the parties' products are not the same (A53), but attempts semantically to blanket them together under the designation "electronics".

The Courts below found that petitioner carefully followed, and impliedly assented to, the progress and growth

of respondent, beginning less than a year from the founding of respondent's business, for eleven years before raising any objection to respondent's use of its name or mark and before taking any action for the relief sought in the present action. Three of petitioner's officers (and particularly both Patent Counsel and General Counsel) knew of respondent's business for all this time, and the rest of them for from one to six years. The testimony of petitioner's own officers clearly show that petitioner was fully aware of the existence and nature of the business of respondent for over a decade and deliberately acquiesced in respondent's activities, until the present suit was started.

Petitioner took no steps whatever to seek to request or prevent respondent from using its tradename or its trademark until the filing of the present suit in December, 1956, of which respondent received notice by service of the complaint on January 21, 1957. The answer filed March 27, 1957, in addition to a general denial, included an affirmative defense of estoppel based on laches, and counterclaims for a declaratory judgment of non-liability for unfair competition or trademark infringement and, in the alternative, in the event that the Court held that there was any likelihood of confusion between the businesses in any products of the parties under their respective names and trademarks, for a judgment that respondent's business preceded that of petitioner in any such products. By this alternative pleading, respondent asserted its priority as to any goods which the Court might find produced likelihood of confusion and made no concession or admissions such as petitioner erroneously states (Pet. 8).

The judgment of the District Court dismissed the complaint as to all counts (Pet. 38). The judgment was based upon findings made by the District Court following an exhaustive trial lasting twelve trial days, during which the

Court considered testimony of thirteen different persons, testifying both as factual and as expert witnesses, in a trial record of some 1600 pages with several hundred exhibits, and had an opportunity to view representative samples of respondent's products and some of petitioner's products. The case involves primarily contested factual issues with relatively simple legal issues, as the District Court noted (301a).

Petitioner's assertion that the Trial Court held that for it to succeed it "must establish similarity of, or competition between its products and those of respondent; and in the absence of such similarity or product competition, the complaint must be dismissed" (Pet. 8) is completely without foundation. The Trial Court in its opinion stated correctly that an issue is likelihood of confusion (301a, 302a, 305a, 306a, 311a). The Court's findings that there was no actual confusion or direct competition (304a, 305a, 307a, 311a) were in answer to petitioner's contentions, and the Court additionally held there was no likelihood of confusion (305a, 306a, 311a).

III

ARGUMENT

No reasons exist for granting the writ.

Petitioner concedes there is no trademark infringement as to respondent's microwave business, by referring to that business as "so different as not to be in any way related" (Pet. 21) and as concerning "non-competing and unrelated goods" (Pet. 21) and "non-competitive" (Pet. 22).

Respondent's remaining business in television studio equipment, which was the only phase of its business which gave the Court of Appeals "some pause" (Pet. 31) was being discontinued at the time of trial (A134) and has already terminated.

The questions raised here are therefore essentially moot.

Furthermore, the reasons advanced by petitioner have no merit.

There Are No Conflicts With the Decisions of This Court or of Other Courts (Pet. 11 to 16)

In an obvious effort to create some extraordinary proposition which might catch the eye of this Court and induce a writ of certiorari, petitioner erroneously asserts as its first and principal reason for the allowance of the writ, that the Court of Appeals below held that *Menendez* v. *Holt*, 128 U. S. 514 (1888) "applies only when the goods of the parties are in competition" (Pet. 12).

The Court of Appeals made no such holding.

The Court of Appeals followed the universally recognized principle that, where petitioner's laches was protracted and

aggravated in character, and materially prejudiced respondent, it constituted equitable estoppel requiring denial of all relief.

To support its position petitioner mistakenly asserts that *McLean* v. *Fleming*, 96 U. S. 245, and *Menendez* v. *Holt*, 128 U. S. 514 state an absolute, inexorable and mechanical rule of law without regard to varying fact situations. Neither these decisions nor the subsequent ones by this Court and other Courts have so ruled.

The *McLean* case involved the proven infringement of the trademark "Dr. McLane's Liver Pills" by the mark "Dr. J. H. McLean's Universal Pills". This Court affirmed an injunction for plaintiff, but because of delay in bringing the suit refused an accounting for damages, saying, at page 253:

> "Equity courts will not, *in general*, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits."

It is clear from the above language that this Court was there laying down a *general* rule, where there was *nothing more* than "delay in seeking relief, where the proof of infringement is clear."

Eleven years after the *McLean* case this Court decided *Menendez* v. *Holt*, 128 U. S. 514, and there sustained a decree refusing an accounting but granted injunctive relief. This Court was urged then to reconsider its holding in *McLean*. In commenting on its earlier decision in *McLean*, this Court made it crystal clear that it would refuse to grant an injunction where facts constituting estoppel were present or where to grant an injunction would be inequi-

table. Petitioner has carefully chosen its quotation from *Menendez* (Pet. 12), which omits the salient reason for this Court's affirmance of injunctive relief there (page 524):

> "At the same time, as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it, a court might hesitate as to the measure of relief, where the use, by others, for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand.
>
> But there is nothing here in the nature of an estoppel, nothing which renders it inequitable to arrest at this stage any further invasion of complainant's rights."

Neither *Menendez* nor *McLean* prohibits any lower court from denying injunctive as well as monetary relief where there is something "in the nature of an estoppel", or where equitable considerations so require in the interests of justice, as here.

In the later case of *Saxlehner* v. *Eisner & Mendelson Co.*, 179 U. S. 19 (1900), this Court barred all relief after a twenty-year delay except to enjoin the defendant from using a label which was an identical copy of a label used by plaintiff in marking an identical commodity. As noted by the Court of Appeals in the present case, the opinion of this Court in *Saxlehner* "which upheld the defense of laches with respect to the word 'Hunyadi', indicated that *Menendez* v. *Holt* does not go so far as appellant claims, even when a portion of the marks and products are identical" (Pet. 34).

Still later, in *French Republic* v. *Saratoga Vichy Co.*, 191 U. S. 427 (1903) this Court denied all relief in a trademark case where the plaintiff had acquiesced for some thirty

years in defendant's use of the word "Vichy" in marketing mineral water.

Petitioner under its first two "Questions Presented" (Pet. 2-3) would thrust upon this Court the question, whether, in a trademark infringement action, delay without more summarily bars injunctive relief. This is an issue not present here. The District Court did not hold, the Court of Appeals did not hold, and respondent does not contend, that mere delay, with nothing more, constitutes a summarily conclusive or automatic bar to injunctive relief in trademark infringement actions. What the District Court held, what the Court of Appeals and other courts have held, and what respondent contends, is simply this:

1. Laches which is prolonged and inexcusable and which operates to a defendant's material prejudice may be held to be an estoppel and to bar all relief.

2. The burden of satisfactorily explaining such aggravated laches devolves upon the plaintiff and such explanation is completely absent here.

3. The extent of the application of the equitable doctrine of estoppel by laches is to be determined in the sound discretion of the court of equity under the particular factual situation presented.

Petitioner's reliance here on the *McLean*, *Menendez* and even *Saxlehner* cases (Pet. 11-14) is completely misplaced since they relate solely to instances where there was *nothing more* than delay, and, in fact, *Menendez* itself is clear authority for dismissal because of the admitted grossly inequitable conduct of petitioner.

Here, as the Court of Appeals held (Pet. 27-29) there was far *more* than mere delay; there were other important factors barring injunctive relief.

As the Court of Appeals emphasized, petitioner sat back for eleven years, even after direct communication from respondent in 1951, without even a protest, and allowed respondent to expend large sums to advertise and expand its business, from 8 to 530 employes, from $2300 to $371,800 in assets, from $3000 to $1,547,400 in inventories, from $12,000 to $6,048,000 in sales (Pet. 28-29). The Court of Appeals emphasized the equitable considerations which motivated its decision here, in its quotation from the *Valvoline* case (211 Fed. 189, 195, S. D. N. Y. 1913) at Pet. 36.

The present case thus *follows* this Court's rulings, and there is no conflict.

Petitioner also urges supposed conflict with the decision of this Court in *Southern Pine Lumber Co.* v. *Ward*, 208 U. S. 126, 140, 141 (Pet. 14). Petitioner attempts to glean a holding from the *Southern Pine* decision that a party can never invoke estoppel where it asserts a counterclaim. The Court of Appeals reviewed this carefully, and found that the *Southern Pine* decision apparently turned upon factors particular to that case, and that even if the somewhat obscure passage from that decision were interpreted as petitioner urges, the present situation is clearly distinguished by the fact that here the parties' circumstances were not parallel, and respondent here made no attempt to foreclose petitioner from its name in the areas of optics and photography (Pet. 33-34). The carefully reasoned opinion of the Court of Appeals shows no conflict here.

Nor is the present case in any way inconsistent with, much less "irreconcilable with" (Pet. 16), the decisions of other circuits.

The Courts of Appeals have universally denied injunctive relief in trademark cases wherever the facts made it inequitable to do so. Such cases are *France Milling Co.* v.

Washburn-Crosby Co., 7 F. 2d 304 (2nd Cir. 1925); *Thomas J. Carroll & Son* v. *McIlvaine & Baldwin*, 183 Fed. 22 (2d Cir. 1910); *Dwinell-Wright Co.* v. *White House Milk Co.*, 132 F. 2d 822 (2d Cir. 1945); *Anheuser-Busch* v. *DuBois Brewing Co.*, 175 F. 2d 370 (3d Cir. 1949); and *Pflugh* v. *Eagle White Lead Co.*, 185 Fed. 769 (3d Cir. 1911). In the latter case, the Court barred all relief and reversed the District Court which had granted injunctive relief, giving particular attention to this Court's holding in *Menendez*, saying at page 772:

> "We are not unmindful of *Menendez* v. *Holt*, 128 U. S. 524, 9 Sup. Ct. 143, 32 L. Ed. 526, and other cases cited in the opinion below, that mere failure to enforce trademark rights will not preclude injunctive relief when it is sought. But those were cases where, as said in Menendez v. Holt, supra, there was nothing 'in the nature of an estoppel, nothing which rendered it inequitable to arrest at this stage any further invasion of complainant's rights.' In this case there is."

The Seventh Circuit, despite petitioner's assertions (Pet. 16), is to the same effect. In *Seven-Up* v. *O-So-Grape Co.*, 283 F. 2d 103 (7th Cir. 1960), the Court of Appeals said, at page 106:

> "Mere delay in bringing suit ordinarily does not affect the right to an injunction against further use of an infringed trademark. Independent Nail & Packing Co., Inc. v. Stronghold Screw Products Inc., 7 Cir. 205 F. 2d 921, 927; Mantle Lamp Co. of America v. Aladdin Mfg. Co., 7 Cir., 78 F. 2d 426, 429. Laches does not necessarily constitute a conclusive and automatic bar to injunctive relief in trademark actions. *However, in many instances, the delay may be so prolonged and inexcusable that it would be inequitable to permit the*

plaintiff to seek injunctive relief as to future activities." (Emphasis added.)

This Court there denied certiorari on questions similar to those raised here (—— U. S. ——, 5 L. ed. 2d 859, April 3, 1961).

Petitioner attempts to avoid the impact of these established principles by raising a spurious cry of "fraud" (Pet. 13-14), urging that respondent's restricted knowledge of petitioner's business and mark at the time respondent began operations should deprive respondent of the support of the equitable powers of the court. Under the facts here, both Courts below, in the exercise of their judgment and discretion, have found that the equities favor respondent.

Respondent's original knowledge of petitioner's business was limited to sunglasses and polarizing materials; respondent was completely ignorant of any involvement of petitioner in the field of electronics (Pet. 28). No similarity between these optical goods and any of respondent's products has been indicated. The only products of petitioner mentioned by the Court of Appeals as creating any uncertainty are those of which respondent had no knowledge (i.e., television filters, Pet. 29, 30-31) and in fact were first sold by petitioner in 1948 (7a), some time after respondent began business in 1945. Even up to 1955, respondent knew of petitioner's activities only in the fields of optics and photography, far from respondent's principal field of microwave equipment (Pet. 33).

When these facts are considered, there are no conflicts with any decisions of other circuits.

In the First Circuit case cited by petitioner (Pet. 16), *Grove Laboratories, Inc.* v. *Brewer & Co.*, 103 F. 2d 175, the Court expressly found that the defendant *acted fraudulently* in adopting and using the trademark LPQ for cold

tablets where plaintiff had earlier extensively used the trademark LBQ for cold tablets. This fact situation is the same as in the *McLean* and *Menendez* cases, which the Court below expressly distinguished here.

In both the Seventh Circuit cases cited (Pet. 16) the facts could spell out no other conclusion than that the defendants were *deliberately seeking advantage* from the plaintiff's reputation. Here, the fact is contrary (121a, A155) and was so found by the Trial Court (305a, 311a).

The Eighth Circuit is not inconsistent with the decision of the Court below. In the *Layton* case relied on by petitioner (Pet. 16) (decided long before the *Emerson, Landers,* and *Duinell-Wright* cases cited by the Court below) complainants protested to the predecessors of the defendant shortly after learning of their use (182 Fed. at 41). This is completely absent from the present case (Pet. 28-29).

The petitioner's reliance on Ninth Circuit cases (Pet. 16) to show supposed conflict is also misplaced. In the *Stork Restaurant* case the goods were identical and defendant user not only had knowledge of the New York restaurant but sought "to capitalize on the prestige of the plaintiff" (166 F. 2d at 360-361, 355) and plaintiff had protested early to defendant.

In *Safeway Stores* the court held that defendant sought to capitalize on the vast expenditures for advertising and plaintiff had written early to defendant (172 F. 2d at 656).

None of these factors is present here. Each of petitioner's citations is distinguishable on its facts and each was decided long prior to the *Seven-Up* case, which this Court refused to review on a similar question.

There is thus no conflict between either decision below and any decision of this Court or of any Court of Appeals.

This Petition Presents No Questions of Public Importance Relating to the Construction of the Trademark Act of 1946 (Pet. 17-23)

Petitioner asserts that a decision by this Court is necessary (a) because the Trademark Act of 1946 fails to establish the extent of protection against infringement, and (b) because the doctrine of laches was not properly applied here, in a trademark case involving a federally registered mark.

Under part (a), petitioner seeks to have this Court decide an issue not decided by the Court of Appeals. The Court of Appeals affirmed dismissal of the complaint on estoppel because of laches, and found it unnecessary to decide any other grounds (Pet. 27, 32). Petitioner here seeks further review in this Court on the merits of issues of fact which were fully considered and determined against petitioner by the Trial Court but not expressly ruled on by the Court of Appeals. In this Court, such issues are in effect academic, and this alone should impel denial of a writ. *Triplett* v. *Lowell*, 297 U. S. 638, 649 (1936).

Moreover, petitioner misinterprets the decisions of the District Court and of the Court of Appeals. The District Court did *not* "require actual product competition" (Pet. 19). It specifically passed upon likelihood of confusion (306a, 311a). The Court of Appeals also discussed likelihood of confusion in its opinion; the passage of its opinion quoted by petitioner (Pet. 19) merely gives the factors to be considered in deciding likelihood of confusion.

In addition, the Court of Appeals did not distinguish *McLean* and *Menendez* "on the ground that those cases involved only competing or substantially identical goods and are not applicable to a situation such as here presented, where respondent has gradually encroached upon peti-

tioner's fields of activity" (Pet. 21). Those cases were distinguished because of the equitable factors discussed above; indeed, far from finding that respondent "gradually encroached upon petitioner's fields of activity", the Court below said "We find nothing to support plaintiff's assertion that defendant has further encroached on plaintiff's field since 1953" (Pet. 36).

Further, this Court denied certiorari in a case clearly raising this very issue, in *Avon Shoe Co., Inc. et al.* v. *David Crystal, Inc. et al.*, 279 F. 2d 607 (2d Cir. 1960), cert. den. 364 U. S. 909 (1960), where the Court of Appeals rejected plaintiff's argument that the first user of a federally registered trademark has an absolute right to enjoin the mark's use on related goods even where there is likelihood of confusion, absent here. The question there was:

> "Does the Lanham Act give the first user of a strong mark an absolute right to injunctive relief against its use on related goods where confusion of origin was found?"

Having refused certiorari in a case directly raising that question, this Court should not grant it where the question does not even arise.

Part (b) of this ground is of even less importance. Petitioner merely seeks a further review of its inequitable conduct as found by both Courts below (307a-310a; Pet. 28-29, 32-36).

The asserted basis for this ground is also not present. The Court below did not base its decision *solely* on petitioner's failure to take action when respondent was small, but additionally pointed out that petitioner failed to act even when respondent's sales exceeded ½ million dollars (Pet. 35).

The application by a court of equity of the conventional tests for estoppel because of laches requires no action by this Court.

The Court Below in Sustaining the Defense of Laches Decided a Real Question (Pet. 23-24)

Petitioner's fourth reason for review has no merit. It was not raised in the Court below, nor was reconsideration requested.

The District Court dismissed the complaint because of both non-infringement and estoppel by laches. This was clearly proper. *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 340 (1928); *Union Pac. R. Co.* v. *Mason City & Ft. D. R. Co.*, 199 U. S. 160, 166 (1905).

On the record before it, the Court of Appeals was clearly within its powers to affirm the dismissal on any one of the grounds relied on by the Trial Court (*Nashville Milk Co.* v. *Carnation Co.*, 238 F. 2d 86, 88 (7 Cir. 1956), affirmed 355 U. S. 373 (1958)) or even on a different ground (*Securities and Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943); *Brown* v. *Allen*, 344 U. S. 443, 459 (1953)). It was not necessary for the Court of Appeals expressly to pass upon both grounds, since affirmance of either sufficed.

Nor was the upholding of the defense of estoppel by laches adademic in the absence of a holding of infringement. Even if infringement existed, the present laches were a complete defense. *A fortiori*, it is a complete defense even though infringement be ignored.

The Court of Appeals did not see fit to set aside the District Court judgment of non-infringement. That judgment therefore properly stands, even though the Court of Appeals may not have expressly passed upon it in its opinion.

IV

CONCLUSION

This litigation is of significance only to the litigants; it is not of such gravity and general importance as to justify review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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